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No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

JEAN GREEN, in her capacity as City Clerk
and EUGENE FORD, in his capacity as
Director of the Highland Park Election Commission,
PETITIONERS

v.

GODFREY FRANKLIN and TALIB KARIM,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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QUESTIONS PRESENTED

1. Whether a State Court can impose supervisory liability on a city clerk under 42 USC Section 1983 based on the single isolated incident by a subordinate where no rights protected under the constitution were violated and there existed no causal connection or link between the alleged constitutional deprivation and the action of the official.

2. Whether a state court can impose supervisory liability under 42 USC Section 1983 where neither supervisory involvement nor actual injury was shown.

PARTIES TO THE PROCEEDING

The caption lists the names of all parties the proceeding herein. Parties below who have no further interest in the proceedings are deleted.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Jean Green and Eugene Ford, petitioners herein, prays that a writ of certiorari issue to review the judgement of the Michigan Supreme Court upholding a judgement by a lower state court in the above entitled case on December 30, 1987.

OPINIONS BELOW

The Michigan Supreme Court upheld the ruling by the Michigan Court of Appeals wherein Appellants were found liable under 42 USC Section 1983 and these rulings are included herein as Appendices C and D.

JURISDICTION

The Appeal hearin is from a final order made and entered in the Michigan Supreme Court on December 30, 1987. The order denies a hearing on the official liability under Federal statute. The Supreme Court of the United States has jursidiction to review this final order by appeal pursuant to 28 USC Section 1257(3).

STATUTE INVOLVED

The federal statute involved is 42 USC Section 1983. It reads:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On November 8, 1983 there was a general election held in the City of Highland Park, Michigan for the offices of Mayor, City Clerk, and City Council. Robert Blackwell, incumbent mayor, ran against Appellee Godfrey Franklin and won narrowly. Appellee Talib Karim was Godfrey Franklin's campaign manager. Appellant Jean Green, incumbent City Clerk also ran and won by a wide margin. Appellant Eugene Ford was the Director of the Elections Commission.

On December 8, 1983 Plaintiffs filed a state Quo Warranto Claim against Robert Blackwell, Mayor of the city of Highland Park, Jean Green, City Clerk, the City of Highland Park, and other governmental officials. Plaintiffs claimed that these persons engaged in fraudulent elections practices which caused Godfrey Franklin's defeat in the Mayoral race. All of the individual Defendants, except Jean Green, supported Mayor Blackwell's candidacy. Plaintiffs prayed for Robert Blackwell's ouster as Mayor, or in the alternative, that the election of November 8, 1983 be voided.

On February 10, 1984, Plaintiffs were given permission to file a First Amended Complaint. They also asked for and received an accelerated trial date. On August 18, 1984, a request for a Second Amended Complaint alleging a 42 USC Section 1983 claim was granted. Then, during trial, Plaintiffs requested leave to file a Third Amended Complaint. The trial court denied Plaintiffs' request to file a Third Amended Complaint.

In the Second Amended Complaint which guided the trial, Plaintiffs alleged that certain irregularities and improprieties committed by the Defendants violated their Constitutional Rights under 42 USC Section 1983. Plaintiffs did not, however, specify any constitutional rights which were violated. (Tr. 9/11/84 P 125-132) Even with this omission, the trial refused to grant summary judgment for Defendants.

At trial, Plaintiffs sought to establish numerous election irregularities and violation of statute. They produced evidence of procedures used by each mayoral candidate to secure senior citizens' votes; they also showed the role of the clerk and her deputies in handling the distribution and collection of absentee ballots in senior citizens' residences.

They also sought to introduce evidence detailing alleged violations of their rights of freedom of association and freedom of assembly in senior citizens; homes, and of their right to fairly engage in the political process. (Tr. 9/10/84, p. 88).

They charged that they were denied the opportunity to inspect the records of the City Clerk for names of person requesting absentee ballots in contravention of the State Election Law. They also charged that they were denied access to senior citizens' dwellings to campaign.

At the close of Plaintiffs' case, the trial court granted Defendants' motion for a directed verdict with respect to the state quo warranto claim. The court ruled that the November election was valid and that Defendant Blackwell was the duly elected Mayor of the City of Highland Park. Although the Court held as a matter of law that the election was valid, the Judge refused to grant a dismissal of the 42 USC Section 1983 claim.

At the conclusion of Defendants' case, Plaintiffs motioned the court for leave to amend their complaint a third time. (T.V. 15, p. 14). They sought an amendment to include First Amendment violations of rights to political expression, freedom of association, and equal participation in the electoral process and the "existence of custom, practice and policy" which caused election violations so that the city would be liable for damages. They also motioned the Court for reinstatement of the quo warranto claim and for a directed verdict with respect to the Section 1983 claim. The trial Court denied all three motions (T.V. 15 p. 48).

Although the court denied leave to add claims under the First and Fourteenth Amendments, jury instructions encompassing these claims were given to the jury. Further, the Court allowed Plaintiffs to include these claims in their theory of the case and argument to the jury. Finally, over Defendants' objection, the Court read Plaintiffs' theory in its jury instruction although the theory was argumentative and beyond the scope of the claims pled in the Second Amended Complaint.

The jury returned a verdict in favor of Plaintiffs and against Appellant Green. No liability was found against the other five defendants. Damages were awarded in the amount of $45,500.00 to Plaintiff Franklin and $0.00 with respect to Plaintiff Karim. The trial Court granted injunctive relief, directing Defendant Green to report on election activities in the City of Highland Park, and removing Defendant Ford from the Election Commission because a city charter violation.

Appellants, herein, brought a Motion for Judgment Notwithstanding the Verdict. This motion was denied. The judgment was appealed. The Michigan Court of Appeals, affirmed the trial courts' verdict.

Appellants thereafter, requested a hearing. This motion was denied by the Court of Appeals Appellant appealed to the Michigan Supreme Court. Leave to Appeal was denied, thereafter, Appellants requested a reconsideration of the court's denials. This was also denied.

REASONS FOR GRANTING WRIT

A. This Court Has Refused To Impose Liability On Supervisory Officials Under 42 USC 1983 Where The Supervisor Was Unaware Of And Had No Connection To The Alleged Misconduct

In upholding the trial verdict, the State Court of Appeal ruled:

> "In this case, plaintiffs introduced evidence that [Defendant] Green's agent told [Plaintiff] Karim that he should not enter the senior citizens' residences to solicit votes, including absentee voter votes, because they (the seniors) were going to be taken care of by the clerk's office. Although these residences, except for one, were privately owned, Green's agents action was sufficient to support the trial court's decision to instruct the jury on Plaintiff's first amendment rights."

1. This case presents important questions concerning the liability of a local official for a single instance of alleged misconduct of a subordinate where the supervisor was not personally involved in the alleged misconduct, had no knowledge of the conduct and was not in any manner causally connected to said misconduct. Thus, this Court should review the extent to which the supervisor had been implicated in the constitutional wrong depicted, and whether the subordinate's misconduct is sufficient to impose liability on a governmental official.

The Michigan Court of Appeals held that a official could be liable without any connection between the injury alleged by the Plaintiff and conduct by the Defendant. The Court's rulings is at variance with and seriously misconstrues this Court's ruling on supervisory liability in *Rizzo* vs. *Goode*, 423 US 362, 96 S Ct 598; 46 L Ed 2d 561 (1976); *Martinez* vs. *California*, 444 U.S. 277; 100 S Ct 553; 62 L Ed 2nd 481 (1980) and *City of Oaklahoma* vs. *Tuttle*, 471 US 808; 105 S Ct 2427; 85 L Ed 2d 791 (1985). In effect the Michigan Court of Appeals allowed supervisory liability to be imposed under 42 USC 1983 on the basis of *respondeat superior*. The Court rejected any analysis of foreseeability, culpability and proximate cause in its ruling. This is both shortsighted and *contrary* to the rulings of this court.

Although direct participation in a subordinates action is not a necessary requirement for supervisory liability, it must be shown that the supervisor caused a violation of Plaintiffs' constitutional rights. In *Rizzo* vs. *Goode* this court vacated an order providing equitable relief against city supervisors for their failure to supervise municipal police officers. This court rejected the nebulous proposition that the official had a constitutional duty to eliminate future misconduct. This court required "an affirmative link between the occurrence of the various incident of police misconduct and the adoption of any plan or policy by Petitioner's express or otherwise, showing their authorization or approval of such misconduct." *Id* at 371.

Applying the law of *Rizzo*, numerous courts have concluded that something more than mere negligence on the part of the supervisor is necessary to state a claim under 42 USC 1983. *See e.g., Hays* vs. *Jefferson County*, 668 F2d 869, 872 (6th Cir 1976); *Haynesworth* vs. *Miller*, 820 F2d 1245, 1260 (D.C. Cir. 1987). The injured party must establish that the supervisory official was grossly negligent or deliberately indifferent in failing to take precautions against a constitutional violation.

Further, *Monell* vs. *Department of Social Services* 436 U.S. 658; 98 S Ct 1028; 56 L Ed 2d 611 (1978) and *City of Oklahoma* vs. *Tuttle*, 471 US 808; 105 S Ct 2427; 85 L Ed 2d 791 (1985) have made it clear that issues of proximate cause and foreseeability must also be analyzed under Section 1983 where supervisory liability is predicated on acts of subordinates. Though it dealt with municipal liability, *Tuttle* addressed important questions relevant in this context.

In *Tuttle*, this court pointed out the conceptual difficulties in using a single incident of constitutional misconduct to show both supervisory involvement and causation. Rejecting respondeat superior as a basis of liability, lower courts were directed to establish liability in terms of "fault" and causation. With this approach, supervisory liability would have to rest on established principles of agency law which holds that principals are not liable for torts of their agents which were not forseeable. When forseeability is considered in supervisory liability, it became difficult to see how liability can be predicated on a single action by the agent.

Thus, it is clear that supervisory involvement and culpability are crucial issues in determining supervisory liability under 42 US Section 1983,. The degree of supervisory involvement considered in light of traditional agency principles is an indispensable consideration in establishing fault. Nonetheless, the Michigan Court of Appeals refused to consider these principles.

Contrary to law and logic, the Michigan Court of Appeals affirmed the imposition of liability on the City Clerk because of her "agents" actions when these actions were not shown to be constitutional impermissible, foreseeable, causally connected to Appellant Green, or linked to any constitutional deprivation. Absent these material elements, liability could only be based on *respondeat superior*. Considering that this basis of liability has been flatly rejected by the this Court in *City of Oklahoma City* vs. *Tuttle* supra., *Monell, supra*, the Michigan Court of Appeals must have applied the wrong standard.

Imposing a duty on local officials to prevent all foreseeable misconduct by subordinates thrusts an excessive burden on supervisors in the performance of official duties. *Haynesworth* vs. *Miller*, supra, at 1261. Responsibility for misconduct should not be predicated on inattentiveness and a single incident of misconduct. There must be a *high degree of fault* in order to implicate the supervisor in the constitutional infractions of his subordinates. *Id* at 1261. Appellees have failed to provide evidence to meet this standard.

B. There Can Be No Supervisory Liability Where The Alleged Misconduct Does Not Violate Protected Rights Under Federal Law.

2. The Appellees also failed to prove the their constitutional rights were violated by a supervisory official or that they suffered any injury. Appellees relied on *Shakman v. The Democratic Organization of Cook County*, 481 F Supp 1315 (ND I11., 1978) to support their claims that their First and Fourteenth Amendment right to vote and participate equally in the electoral process were diminished. The Court of Appeals erroneously ruled that Appellees had offered sufficient proofs showing that their rights were violated under 42 USC 1983.

The First Amendment rights of political association and equal participation in the electoral process are completely different from the claims asserted in this action. The Court failed to distinguish this action from *Shakman*, and improperly allowed this verdict to stand.

Shakman was a suit brought by a class of unsuccessful candidates and voters who challenged the patronage system of the regular Democratic party of Cook County, Illinois. The court held that "the challenged patronage practice gives the defendants an actual, significant advantage in elections" and as such infringed the First and Fourteenth Amendment right of Plaintiffs. The case did not "challenge the defendants' use of political considerations in their employment decisions concerning policy making officials . . . " The system in *Shakman* used jobs to control and coerce the political behavior of county employees. *Id* at 132.

In this action, there was no *systematic* interference with the electoral process. The Court seized upon the fact that Appellant Green's agent told Appellee Karim that he could not enter the senior citizens residence to solicit votes. This evidence seized upon by the Courts is woefully inadequate to support a constitutional violation. It hardly equates with the "systematic patronage" shown in *Shakman*. More importantly it misrepresents the content of the witness' testimony. The testimony showed that employees of the clerk's office were the only persons authorized to deliver absentee voter applications and pick up absentee voter ballots.

Assuming the statement was correct, there was no burden was imposed on Appellee Karim's vote or Appellee Franklin's candidacy. Impairment of a candidates efforts to obtain public office cannot by itself by equated with interference with protected First Amendment freedoms.

In *Shakman* the Court reviewed the arguments of the parties relative to Plaintiff's burden of proof. It held that Plaintiffs must show on *actual, significant advantage* to their opponents before they can prevail.

In the case at bar, the trial court and the Court of Appeals court found that an advantage could have occurred in favor of Mayor Blackwell in the election. This is neither sufficient nor warranted. First, there must be *an actual* showing of advantages to Mayor Blackwell. Second, the conduct of "Green's agent" must have been both intentional and discriminatory. The evidence relied upon by the Court of Appeals fails for two important reasons. First, plaintiffs did not prove that a "systematic practice" existed. Secondly, they failed to prove that there was intentional or purposeful discrimination as required.

To show deprivation of a right in this action, Plaintiffs must have shown 1) that there was intentional discrimination by the municipality because of their political beliefs and (2) an actual significant advantage in an election to his or her opponent, *Shakman*, p. 1348. Neither was the case.

In *Shakman*, the Court specifically found the requisite advantage based on stipulations by the parties. There, the proof of patronage sponsorship was widespread, systematic, and undisputed. Here the court offers a single, questionable, disputed piece of evidence. That evidence was not shown to be discriminatory, attributable to Appellant Green, nor an advantage to Appellants' opponent. In fact, Appellees were not the political opponents of Appellant Green.

Further there is no evidence that city employees engaged in conduct which deprived Plaintiffs of their constitutional right to vote, hold office, be elected and/or to engage in free speech or assembly. Appellees' evidence has not shown the requisite nexus between the conduct of the city employees and/or private citizens, actions of the Defendant Green herein and the deprivation of protected rights of speech, assembly or voting. There is no evidence to support a finding that Appellants actions violated any constitutional rights of Appellees.

Specifically, Appellees failed to prove as a matter of law that:

(a) The City Clerk denied them access to any building;
(b) The City Clerk knew or should have known of their lack of access to these buildings;
(c) The City Clerk intentionally or purposefully discriminated against Plaintiffs and that a significant advantage to their opponent was gained by the denial of deprivation of their constitutional rights;
(d) The City Clerk did any act which denied Plaintiffs of their right to political expression or belief, right to freedom of association and denied Plaintiffs equal participation in the electoral process.

There is no factual basis as a matter of law for holding Appellant Green liable for violation of 42 USC Section 1983 or for a First Amendment violation. The facts do not show that she performed any misconduct which proximately caused a constitutional violation. *Redmond vs. Baxley* 475 F. Supp 111 (ED Mich, 1979). As a matter of law, assuming *arguendo*, some misconduct occurred, the actions constituted negligence at most or violation of state election laws for efficiencies. See *Daniels vs. Williams* 474 U.S. 327; 106 S. Ct. 662; 88 L Ed 2d 662 (1986); *Davidson vs. Cannon* 474 U.S. 344; 106 S Ct. 668; 88 L Ed 2d 667 (1986). There are no material facts to show that there was a link between the various incidences of alleged misconduct and Appellant Green's authorization, and/or personal participation in any constitu-

tional violations. Indeed, there is no evidence in the record to support that a constitutional violation occurred.

C. The State Court Can Not Grant Injunctive Relief When No Actual Injury Is Shown.

The state court also erred in awarding injunctive relief and allowing monetary damages where there was no showing of actual injury. The Michigan Court of Appeals' affirmation of the trial Court's ruling was premised upon convoluted reasoning with respect to the issue of damages. On the one hand, the Court of Appeals affirmed the trial court's denial of Plaintiff's Quo Warranto Claim (it was held that the election law violations did not effect the election's outcome). On the other hand, the Court of Appeals upheld a damage award contingent upon Plaintiff Franklin's salary loss in his bid for Mayor. (The mayor's salary was $45,500.00, the amount of the jury award). In essence there is no evidence in the record from which a rational jury or judge could conclude either that such constitutional violations actually occurred or that Appellees suffered any compensable injury and damages.

The Michigan Court of Appeals' ruling contravenes the prerequisites for recovery of damages pursuant to 42 USC Section 1983. In *Memphis Community School District vs. Stachura*, 477 US _____; 106 S Ct 2537, 91 L Ed 2d 249 (1986), this court noted that the basic purpose of Section 1983 damages "is to compensate persons for injuries that are caused by the deprivation of a constitutional right." The theoretical underpinning of damages in tort claims, the court noted, is "compensation for the injury caused to Plaintiff by defendant's breach of duty," Thus, the criteria for ascertaining constitutional damages is directly analogous to that used for common law tort damages – that is, compensation for actual injury. This fundamental doctrine was echoed in *Carey vs. Phipus*, 435 U.S. 247; 98 S. Ct. 1042; 55 L. Ed 2d 252 (1978). In

Carey, this acknowledged that, Plaintiff, a high-school student, was improperly suspended, and deprived of procedural due process. However, relief was limited to nominal damages inasmuch as Plaintiff was unable to substantiate "proof of actual injury" *Carey*, supra 266.

When employing the aforementioned test of recovery for constitutional injury pursuant to Section 1983, the Michigan Court of Appeals has misinterpreted clearly cognizable law. Appellees' actual injuries are nil because the trial Court held that Appellee Franklin would have lost the election, notwithstanding any alleged election violation.

The Michigan Court of Appeals ruling requires review for one additional reason. Plaintiffs were granted Injunctive relief based on the conduct of "Green's agent". Since there was no proven, on-going disadvantage to the Plaintiffs, there was no basis for injunctive relief. To allow liability in the absence of corresponding evidence is contrary to law. *City of Los Angeles vs. Lyons*, 461 US 95; 103 S Ct 1660; 75 L Ed 2d 675 (1983). In order to achieve injunctive relief, a plaintiff must demonstrate the supervising official's propensity to engage in unlawful conduct. It is incumbent on Plaintiff, to demonstrate past, unconstitutional conduct in tandem with "continuing, present, adverse effects," *O'Shea vs. Littleton*, 414 U.S. 488; 94 S Ct. 669, 38 L Ed 2d 674 (1974).

In the case herein, the Michigan Court concluded without factual foundation that "plaintiffs will continue to vote and may even run for office again". Possibility of ocurrence is not the requisite factual foundation required. Moreoever, Plaintiffs are not candidates for office nor have they asserted any continuing adverse impact on their votes. The single, discrete example of alleged misconduct by "Green's agent" is an insufficient basis to confer standing on these parties.

Lastly, the Michigan Court restricted Appellant Ford's participation on the Election Commission without any show-

ing of continuing, adverse impact, a clear deviation from the test enunciated in *Lyons, supra*. Any assertion that he abrogated Plaintiffs consitutional right is non-existent. Rather, Appellees merely asserted that Appellant Ford occupied a position in violation of the election law or the City Charter.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully Submitted

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APPENDICES

APPENDIX A

State of Michigan Courts of Appeals

GODFREY FRANKLIN and TALIB KARIM,

Plaintiffs-Appellees
Cross-Appellants,

v No. 8288

JEAN GREEN, in her capacity as City Clerk,

Defendant-Appellant
Cross-Appellee,

and

EUGENE FORD, in his capacity as director of the Highland Park Department of Public Works and as a member of the Highland Park Election Commission.

Defendant-Appellant,

and

THE CITY OF HIGHLAND PARK, a municipal corporation; ROBERT BLACKWELL, in his capacity as present Mayor and as Mayor-Elect of the City of Highland Park; NORRIS GOUDY, in his capacity as acting City Attorney for the City of Highland Park and Chairman of the Highland Park Election

Commission; and CARL KERTTU, in his capacity as Chief of Police and as a member of the Highland Park Election Commission, jointly and severally,

Defendants.

Before: W.P. Cynar, P.J., and J.H. Gillis and D.F. Walsh, JJ.

PER CURIAM

Defendants Jean Green (Green) and Eugene Ford (Ford) appeal as of right from an injunctive order entered against both Green and Ford, as well as, a judgment entered against Green. Green also challenges the trial court's orders denying her motions for a judgment notwithstanding the verdict, a new trial, or remittitur. Plaintiffs cross appeal, claiming that the trial court erred when it granted a directed verdict on their quo warranto claim and when it denied their motion to file a third-amended complaint. We affirm.

The actions giving rise to the claim occurred during the course of mayoral elections, conducted in the city of Highland Park, in the fall of 1983. Plaintiff Godfrey Franklin (Franklin), with plaintiff Talib Karim (Karim) as his campaign manager, ran for mayor in opposition to defendant Robert Blackwell (Blackwell), the incumbent mayor. Franklin was defeated, but the margin of loss was small. Five thousand four hundred thirty-six ballots were cast and Franklin lost the election by only 157 votes.

One thousand twenty-seven votes were absent voter (AV) ballots which were treated and counted as a separate precinct. Blackwell received 644 of these votes and Franklin received 343. The parties do not dispute the fact that, but for these votes, Franklin would have won the election.

On December 8, 1983, plaintiffs filed a complaint for quo warranto in Wayne County Circuit Court alleging improprieties in obtaining, processing and counting the AV ballots. In addition, plaintiffs alleged that Green, in her capacity as City Clerk, failed to notify plaintiffs of accuracy tests of the voting machines and to provide plaintiffs with timely lists of AV applicants upon request. Plaintiffs later amended their complaint, seeking damages and injunctive relief under 1983.

At the close of plaintiffs' proofs, defendants moved for a directed verdict on both counts. Their motion on the quo warranto claim was granted, but their motion on the 1983 claim was denied.

At the close of defendants proofs, both parties presented motions to the court. Plaintiffs again sought to amend their complaint to include deprivation of first amendment rights and the existence of custom, practice and policy in the conduct of the election. Plaintiffs also sought reinstatement of their quo warranto claim and a directed verdict against Green on their 1983 claim. Defendants again moved for a directed verdict on the 1983 claim. All of these motions were denied.

Following closing arguments, the jury was given the parties' respective theories of the case. The jury also was instructed on rights protected by the first and fourteenth amendments.

In the exercise of its equitable powers, the trial court ordered Green to review election procedures and establish new procedures to ensure that future elections would conform to statutory requirements. In addition, the court determined that defendant Ford was ineligible to be a member of the Election Commission pursuant to the Highland Park city charter.

The jury found in favor of plaintiffs on the § 1983 claim against defendant Green only. Franklin was awarded damages of $45,500; Karim, nothing. Green's subsequent motions for judgment notwithstanding the verdict, new trial, or remittitur were denied.

Green and Ford (defendants) first claim that plaintiffs' pleadings were insufficient to state a claim under § 1983 because they failed to point to a specific consitutional right which was transgressed. To state a claim under § 1983, a plaintiff must plead and prove two elements: (1) that he has been deprived of a right secured by the Constitution and laws of the United States and (2) that the defendant deprived him of this right while acting under color of law. Moore v Detroit, 128 Mich App 491; 340 NW2d 640 (1983), lv den 422 Mich 891 (1985).

Here, only the first element is in issue. Plaintiffs alleged that defendants' acts and omissions violated their Fourteenth Amendment rights by diminishing and negating plaintiffs' votes, effectively causing them to be denied their right to vote. In Shakman v The Democratic Organization of Cook County, 481 F Supp 1315, 1334-1335 (ND Il1, 1979), the United States District Court held that while there is no constitutional right to vote, the equal protection clause confers upon individuals the substantive right to participate in elections on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the state's population. Equal electoral participation can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the exercise of the franchise. Id. (quoting Reynolds v Sims, 377 US 533, 555; 84 S Ct 1362; 12 L Ed 2d 506 [1964]).
Under Shakman, supra, it is clear that plaintiffs' pleadings were sufficient to state a claim under § 1983.

Defendants next claim that the trial court erred when it instructed the jury on plaintiffs' first amendment rights regarding their § 1983 claim because plaintiffs failed to plead or introduce evidence of such violations. Instruction on a theory unsupported by the evidence is error requiring reversal. Wigginton v City of Lansing, 129 Mich App 53, 62; 341 NW2d 228 (1983), lv den 419 Mich 880 (1984).

In Shakman, supra, 1331-1334, the court noted that where state officials burden an individual's candidacy because a plaintiff has chosen to run against their political message, the state officials impinge upon plaintiff's first amendment rights. Moreover, when the state acts to oppose certain candidates on the ballot, it renders less valuable the plaintiff's first amendment associational rights.

Hence, even though there is no right to run for office, the rights of voters and candidates combine to give the candidate the right to be free from official discrimination on the basis of his political beliefs. Id. at 1337-1338. Similarly, voters have a right not to have the campaigns of the candidates they support deliberately disadvantaged by official action. Id. at 1338.

In this case, plaintiffs introduced evidence that Green's agent told Karim that he should not enter the senior citizens' residences to solicit votes, including absentee voter votes, because they (the seniors) were going to be taken care of by the clerk's office. Although these residences, except for one, were privately owned, Green's agent's action was sufficient to support the trial court's decision to instruct the jury on plaintiffs' first amendment rights.

At this point, we note that plaintiffs appeal the trial court's order denying their motion to amend their complaint to allege first amendment violations. Because defendants had sufficient notice that they might have to defend against a freedom of association claim from plaintiffs' pleadings, we agree that it was error for the trial court to refuse plaintiffs' motion to amend; however, given that the jury was instructed on plaintiffs' first amendment rights, this error was harmless.

Defendants also claim that the trial court erred when it instructed the jury on plaintiffs' theory of the case because plaintiffs' theory did not conform to the pertinent court rule, namely, MCR 2.516(A)(2). Although plaintiffs' theory is

lengthy and argumentative, we find that the trial court did not abuse its discretion in giving plaintiffs' theory to the jury.

Defendants next contend that they were denied a fair trial by the trial court's comments which were made in front of the jury. Having reviewed the entire record in this case, we conclude that these isolated comments did not deny defendants their right to a fair trial. See People v Burgess, 153 Mich App 715, 719; ___ NW2d ___ (1986).

Defendants also contend that they were entitled to a judgment notwithstanding the verdict. A judgment notwithstanding the verdict may be granted only where there is insufficient evidence as a matter of law to make an issue for the jury. Willoughby v Lehrbass, 150 Mich App 319, 344; 388 NW2d 688 (1986). If reasonable minds could differ after viewing the evidence in the light most favorable to the nonmoving party, a motion for a judgment notwithstanding the verdict is properly denied. Id. Viewing the evidence in the light most favorable to the plaintiffs, we believe that there was sufficient evidence presented from which the jury could conclude that defendants' activities purposefully discriminated against plaintiffs, providing Blackwell with an advantage in the election. Shakman, supra.

Defendants further contend that the damages awarded by the jury to Franklin should have been reduced to one dollar (i.e., nominal damages) because the trial court's decision on the quo warranto claim was that Blackwell would have won the election anyway. In this case, plaintiffs' theory was that Franklin was entitled to $182,000 ($45,500, the mayor's salary, multiplied by four, the number of years in the mayor's term). In a § 1983 claim, the plaintiff is allowed to recover compensatory as well as punitive damages. Memphis Community School District v Stachura, 477 US ___; 106 S Ct ___; 91 L Ed 2d 249 (1986). Plaintiffs in this case claimed only compensatory damages. Compensatory damages are meant to compensate plaintiffs for the injuries caused to plaintiffs as a

result of defendants' actions. Id. As noted by defendants, the trial court granted defendants' motion for a directed verdict on plaintiffs' quo warranto claim. The court's finding was based on its conclusion that the election-law violations would have made no difference in the election's outcome. As noted above, defendants now claim that because the trial court concluded that the quo warranto claim should not be granted that Franklin is not entitled to compensatory damages. Nevertheless, we note that the trial court did allow the § 1983 case to reach the jury. Having done so, the jury could conclude that defendants' violations of that statute resulted in the damages it awarded Franklin, even though the trial court found that the quo warranto claim should be denied.

Defendants also claim that the trial court's decision to grant plaintiffs' request for injustice relief as to their § 1983 claim was erroneous. The basic prerequisites of issuing equitable relief in a § 1983 claim are the likelihood of substantial and immediate irreparable harm and the inadequacy of remedies at law. City of Los Angeles v Lyons, 461 US 95, 103; 103 S Ct 1660; 75 L Ed 2d 675 (1985). Hence, the plaintiff must be threatened with repetition of the alleged constitutional deprivation. Id. Here, it is clear that plaintiffs will continue to vote and may even run for office again. Furthermore, defendants' activities, which could be found to violate § 1983, would continu[illegible]hreaten the value of plaintiffs' votes. It is clear that damag[illegible]uch a case as this would be inadequate. Hence, the trial court properly granted plaintiffs' request for injunctive relief.

Finally, plaintiffs claim the trial court improperly granted a directed verdict on their quo warranto claim. At the time of defendants' motion, the trial court noted that noncompliance with sub-provisions of the Election Code will invalidate a

ballot only where the statute is deemed mandatory. The trial court then proceeded to classify the alleged violations as either mandatory or merely directory. Reviewing each of the 1,027 AV ballots, 34 were invalidated because no statutory basis for requesting an AV ballot was checked off, and one was invalidated because it was mailed to the voter before application for it was received. Assuming that all of these votes were cast for Blackwell, and further assuming that an additional 43 votes for Blackwell should be invalidated because of signature irregularities, the trial court's computations indicated that Franklin would still have lost the election by 79 votes.

Plaintiffs do not contest the trial court's classifications. Instead, they urge this Court to adopt another approach, specifically to invalidate all of the AV ballots because of the "taint" stemming from the actions of defendants is conducting the election. If all the AV ballots were disregarded, Franklin would win the election by 144 votes.

In a proceeding in the nature of quo warranto, where plaintiffs allege irregularities on the part of election officials, the election should not be set aside unless it appears that the irregularity affected the result. Behrendt v Wilcox, 277 Mich 232, 246; 269 NW 155 (1936). The primary objective of an election is to enable voters of a precinct to express their choice of candidates, and while fraud on the part of a voter vitiates his ballot, fraud or a mistake on the part of election officials should not operate to defeat the will of the electorate. Attorney General ex rel Miller v Miller, 266 Mich 127, 132-133; 253 NW 241 (1934). Consequently, when fraud on the part of the election officials is established, the poll will not be rejected, unless it proves impossible to purge it of the fraud. Id. at 146.

Plaintiffs, of course, claim that defendants' actions tainted the entire AV ballot and, therefore, the trial court should have invalidated the entire AV vote. Plaintiffs' claims at the time of defendants' motion for a directed verdict concerned only certain election statutes which were supposedly

violated by defendants. The trial judge carefully reviewed these alleged violations and purged the vote of the tainted ballots. Giving plaintiffs the benefit of every purged vote, the outcome of the election remained the same. Balancing the interests of plaintiffs against the interests of the electorate in having the officeholder of their choice, the trial court properly directed a verdict on the quo warranto claim. Behrendt, supra; Miller, supra.
Affirmed.

/s/Walter P. Cynar
/s/John H. Gillis
/s/Daniel F. Walsh

APPENDIX B

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the city of Lansing , on the 5th day of May in the year of our Lord one thousand nine hundred and eighty-seven.

GODFREY FRANKLIN and TALIB KARIM,
Plaintiffs Appellees,
Cross-Appellants,

v

HIGHLAND PARK CITY CLERK,

Defendant-Appellant,
Cross-Applellee,

and

DIRECTOR OF THE HIGHLAND PARK DEPARTMENT OF PUBLIC WORKS AND MEMBER OF THE HIGHLAND PARK ELECTION COMMISSION,
Defendant-Appellant,

and

THE CITY OF HIGHLAND PARK, a Municipal Corporation; MAYOR AND MAYOR-ELECT OF THE CITY OF HIGHLAND PARK; ACTING CITY ATTORNEY OF THE CITY OF HIGHLAND PARK AND CHAIRMAN OF THE HIGHLAND PARK ELECTION COMMISSION; and HIGHLAND PARK CHIEF OF POLICE AND MEMBER OF THE HIGHLAND PARK ELECTION COMMISSION, Jointly and Serverally,

Present the Honorable
WALTER P. CYNAR
Presiding Judge

JOHN H. GILLIS

DANIEL F. WALSH

Judges

Docket No. 82887
L.C. No. 86 37651 AW

No. 82887
Page 2

Defendants.

_____ /

In this cause a motion for rehearing is filed by defendants-appellants, and a motion for immediate consideration and an answer in opposition to the motion for rehearing are filed by the plantiffs-Appellees, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for immediate consideration be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the motion for rehearing be, and the same is hereby DENIED.

STATE OF MICHIGAN — ss.
I Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 5th day of May in the year of our Lord one thousand nine hundred and eighty-seven.

_____
Clerk

CA3C180

APPENDIX C

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the court of appeals in the City of Lansing, on the 5th day of May in the year of our Lord one thousand nine hundred and eighty-seven.

GODFREY FRANKLIN and TALIB KARIM,
Plaintiffs-Appellees,
Cross-Appellants,

v

HIGHLAND PARK CITY CLERK,
Defendant-Appellant,
Cross-Appellee,

and

DIRECTOR OF THE HIGHLAND PARK DEPARTMENT OF PUBLIC WORKS AND MEMBER OF THE HIGHLAND PARK ELECTION COMMISSION,

Defendant-Appellant,

and

THE CITY OF HIGHLAND PARK, a Municipal Corporation; MAYOR AND MAYOR-ELECT OF THE CITY OF HIGHLAND PARK; ACTING CITY ATTORNEY OF THE CITY OF HIGHLAND PARK AND CHAIRMAN OF THE HIGHLAND PARK ELECTION COMMISSION; and HIGHLAND PARK CHIEF OF POLICE AND MEMBER OF THE HIGHLAND PARK ELECTION COMMISSION, Jointly and Severally,

Defendants.

In this cause a motion for rehearing is filed by defendants-appellants, and a motion for immediate consideration and an answer in opposition to the motion for rehearing are filed by Plaintiffs-Appellees, and due consideration thereof having been had by the Court,

Present the Honorable
WALTER P. CYNAR
Presiding Judge

JOHN H. GILLIS
DANIEL F. WALSH
Judges
Docket No. 82887
L.C. No. 86 37651 AW

APPENDIX D

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 30th day of December in the year of our Lord one thousand nine hundred and eighty-seven.

81107(73)

GODFREY FRANKLIN and TALIB KALIM,
Plaintiffs-Appellees,

v

HIGHLAND PARK CITY CLERK
Defendant-Appellant,

and

DIRECTOR OF THE HIGHLAND PARK DEPARTMENT OF PUBLIC WORKS and MEMBER OF THE HIGHLAND PARK ELECTION COMMISSION,
Defendants-Appellants,

and
THE CITY OF HIGHLAND PARK, a municipal corporation; MAYOR AND MAYOR-ELECT OF THE CITY OF HIGHLAND PARK; ACTING CITY ATTORNEY FOR THE CITY OF HIGHLAND PARK ELECTION COMMISSION; CHIEF OF POLICE and MEMBERS OF THE HIGHLAND PARK ELECTION COMMISSION, jointly and severally,

Defendants.

Present the Honorable
DOROTHY COMSTOCK RILEY,
RILEY,
Chief Justice
CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DENNIS W. ARCHER,
ROBERT P. GRIFFIN,
Associate Justices

SC: 81107
COA: 82887
LC: 83-337651-AW

On order of the Court, the motion for reconsideration of this Court's order of September 28, 1987 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

STATE OF MICHIGAN — ss.

I. CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said cause; that I have compared the same with the original, and that is a true transcript therefrom, and the whole of said origianl order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court of Lansing, this 30th day of December in the year of our Lord one thousand nine hundred and eighty seven.

Clerk.

Deputy

No. 87-1861

In The
Supreme Court of the United States
October Term, 1987

—o—

JEAN GREEN, in her capacity as City Clerk, and EUGENE FORD, in his capacity as Director of the Highland Park Election Commission,

Petitioners,

v.

GODFREY FRANKLIN and TALIB KARIM,

Respondents.

—o—

On a Petition for a Writ of Certiorari to the Supreme Court for the State of Michigan

—o—

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

—o—

SCHIER, DENEWETH & PARFITT, P.C.
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or call collect (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did Defendants violate Plaintiffs' constitutionally protected right of suffrage?

2. Was relief granted by the trial court in accordance with applicable law?

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TABLE OF AUTHORITIES

No. 87-1861

In The

Supreme Court of the United States

October Term, 1987

JEAN GREEN, in her capacity as City Clerk, and EUGENE FORD, in his capacity as Director of the Highland Park Election Commission,

Petitioners,

v.

GODFREY FRANKLIN and TALIB KARIM,

Respondents.

On a Petition for a Writ of Certiorari to the Supreme Court for the State of Michigan

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

Respondents, GODFREY FRANKLIN, an unsuccessful candidate for election to the office of Mayor of the City of Highland Park, Michigan, in the November, 1983 general election, and his campaign manager, TALIB KARIM, respectfully request that this Court deny the

petition for certiorari to review the decision of the Michigan Supreme Court in *Franklin and Karim v. Highland Park City Clerk, et al.*, 429 Mich. 855 (1987), affirming *Franklin and Karim v. Highland Park City Clerk, et al.*, unpublished Michigan Court of Appeals Opinion, Docket No. 82887.

STATEMENT OF THE CASE

Petitioners have not presented a correct statement of the case.

Additional details must be provided.

In the general election of November 8, 1983, 5,436 ballots were cast for the office of Mayor. Of that total, 1,027 or 18.9% were absent voter (AV) ballots. (PL EX 29) AV ballots were cast city-wide, as opposed to having been cast in each precinct. However, the absent voter ballots were treated as one precinct, Precinct 26. There were 25 geographically located precinct polling places. Of those 25 precincts, Respondent Franklin carried 15, and but for the absent voter balloting, he would have won the election.

When the ballots were counted, and when the final canvass was ultimately certified by the Board of City Canvassers on November 9, 1983, incumbent Mayor Blackwell had garnered 2,800 votes, and Respondent Franklin had obtained 2,643 votes. Respondent Franklin lost the election by 157 votes. A closer examination of the votes reflects that Respondent Franklin obtained 2,300 votes from those voters who did not cast absent voter ballots. Mayor

Blackwell obtained 2,156 of such votes, 144 votes less than Respondent Franklin. In the absent voter precinct, Blackwell obtained 644 votes, and Franklin obtained 343 votes. The difference was 301 votes. Reviewing the tally as a whole, Blackwell won by 157 votes out of a total of 5,436 ballots cast, a margin of 2.8% of the total ballots. In the total of all precincts exclusive of the absent voter precinct, Respondent Franklin "won" by 144 votes out of the total of 4,456, or 3.2% of the total votes cast. But in the absent voter precinct, where Mayor Blackwell defeated Respondent Franklin by 301 votes, his margin of victory represented 30% of the total of absent voter ballots.

The case, then, was about the conduct of the election in the absent voter precinct, and it arose from numerous violations of the state election laws by the City Clerk, Petitioner Jean Green, and the Mayor, Robert Blackwell.

From among the groups of potential absent voters, that group which is ripe for exploitation is those 60 years of age or older, the senior citizens. In Highland Park, there are a substantial number of senior citizens. They live in residences established solely for their occupation. Those residences are known as Downes Manor, LaBelle Towers, Bishop Moore, Gabriel, and 279 Ridgeton. The number of potential voters living in those residences alone was estimated by witness Christine Franklin, former wife of Respondent Godfrey Franklin, to be 100 to 200 in each of the buildings. (TR VII, p. 44; TR VII, pp. 31-32) Given the fact that there are five buildings, the potential is for 1,000 absent voter ballots from senior citizens, about 18% of the total vote cast for Mayer, and clearly enough to affect the outcome of the election.

The importance of the senior citizen vote was agreed to by all parties. Mayor Blackwell had a committee concerned only with soliciting absent voter ballots (TR IX, p. 30), and he actively campaigned for AV ballots from senior citizens, as well as others. (TR IX, p. 31)

Petitioner Jean Green, in fact, had a network of authorized representatives established for the senior citizen residences to solicit absent voter ballot applications, to run the ballots to the residences, to vote the ballots within the residences, and to run the voted ballots back to the clerk's office. (TR VIII, pp. 64-66, 69-71)

The Petitioners suggest that the decision of the Michigan Court of Appeals, and the Respondents' case, turned on an isolated instance of the failure of a subordinate of Jean Green to act in accordance with law. Nothing could be further from the truth. Rather, Jean Green engaged in manipulation of the balloting by absent voters in complete disregard of the requirements of the Michigan election law, and her efforts had an adverse consequence for rights guaranteed to Respondents Godfrey Franklin and Talib Karim by the United States Constitution.

The applicable provisions of Michigan law are found in the Michigan Election Law of 1954, Act 116 of the Public Acts of 1954, the same being MCL 168.1-168.992.

Jean Green's misconduct and her violations of the election law were numerous.

Jean Green accepted, and Jean Green countenanced the acceptance of, applications for absent voter ballots more than seventy-five (75) days before the general election, in violation of Section 759 of the election law.

Jean Green failed to make, and failed to cause to be made, lists of persons who applied for absent voter ballots, including their addresses, the date of receiving the application, the date of mailing the ballot to the voter, and the date of receiving the ballot from the voter; and following the belated preparation of the lists, she refused to make the applications and lists available for inspection by Respondents Franklin and Karim, in violation of Section 760 of the election law.

Jean Green refused to permit Respondent Talib Karim, a properly-qualified person, to make application as a Registrar, in violation of Section 504 of the election law.

Jean Green omitted to include with the absent voter ballots a set of instructions and a statutory warning, which warning addressed much of the misconduct of which Jean Green and her subordinates were guilty, in violation of Section 764(A) of the election law.

Jean Green failed to require persons who assisted absent voters in marking their ballots to sign the ballots, stating that they had, in fact, assisted absent voters, in violation of Section 761 of the election law.

Jean Green oversaw the delivery to senior citizen residences in the City of Highland Park, and she received from senior citizen residences in the City of Highland Park, large numbers of absent voter ballots, in violation of Section 761 of the election law, which required ballots to be mailed or delivered in the order in which the applications for requests were received.

Jean Green told one of her assistants to conduct gatherings at which the senior citizens voted absent voter ballots, in violation of Section 764(A) of the election law.

Jean Green and her subordinates accepted unsealed ballot envelopes containing ballots for counting, in violation of Section 764(A) of the election code, which requires ballot envelopes to be sealed upon delivery.

Jean Green permitted persons other than the absent voter to deliver absent voter ballots, en masse, to the Clerk's office, without written authorization, in violation of Section 764(A) of the election law.

Jean Green willfully disobeyed the lawful instructions of the Secretary of State of the State of Michigan, regarding the conduct of elections, in violation of Section 93(M) of the election code.

All of the foregoing violations of the election law were admitted.

Mention is made in the Petitioners' statement that the Respondents sought leave of the trial court to file a third amended complaint, setting forth First Amendment rights which had been violated by the conduct of the Petitioners, the facts supporting which were the subject of testimony at the trial. The trial court did, in fact, deny leave to file a third amended complaint, but the Michigan Court of Appeals ruled "that it was error for the trial court to refuse Plaintiffs' motion to amend; however, given that the jury was instructed regarding Plaintiffs' First Amendment rights, this error is harmless."

Both Respondents Franklin and Karim voted in the election.

Petitioners did not include in their appendix the original decision of the Michigan Supreme Court, which is attached as Appendix 1.

———o———

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Petitioners Have Failed To Present Reasons For Granting Certiorari Under Rule 17.1, And They Have Created And Addressed The Issue Of The Liability Of A Public Official For A Subordinate's Activity Although That Issue Was Not An Issue In The Case.

Petitioners have failed to state, by reference to Supreme Court Rule 17, why the writ of certiorari should be granted. There is clearly no federal court of appeals' decision in conflict with the decision of another federal court of appeals, and there is no assertion in the petition that the Michigan Supreme Court has decided a federal question in a way that is in conflict with a decision of another state court or with the federal court of appeals.

It is perhaps under Rule 17.1(C) that the petition is brought, on the assertion that there is an important question of federal law which has not been but should be settled by the Supreme Court of the United States.

In fact, Petitioners have isolated a fragment of the unpublished Opinion of the Michigan Court of Appeals, in an attempt to fabricate an issue which was not properly raised by the Petitioners during proceedings below.

That issue is the purported misconduct of a subordinate for which Jean Green is alleged to have been held liable.

That issue was not raised as an affirmative defense, nor was it raised at trial, nor was it raised on appeal to the Michigan Court of Appeals or in Petitioners' motion for rehearing to the Michigan Court of Appeals. It was first raised in Petitioners' Application for Delayed Appeal to the Michigan Supreme Court.

The focus of the trial was the active misconduct of Jean Green and Robert Blackwell, not supervisory liability.

The trial addressed the manipulation of absent voter balloting by both of them as incumbent officeholders and candidates, and the effect of that manipulation on the constitutional rights of the Respondents. Jean Green, and through her, Robert Blackwell, had at her fingertips the machinery to solicit applications for absent voter ballots; to run the ballots by messenger to senior citizens' residences; to distribute the ballots at the senior citizens' residences and to conduct meetings therein to vote absent voter ballots; and to return the voted ballots for counting. If these activities can be concluded before other candidates have an opportunity to identify and reach prospective absent ballot voters, an incumbent may successfully exclude other candidates from access to such voters, or at least delay access by other candidates, and thereby have a significant impact on the outcome of the election. Incumbents are thereby favored over non-incumbents, because the incumbents,- the Mayor and City Clerk, control the machinery of the election process. Unfortunately, a strong case could not be made against Robert Blackwell, and the verdict caught only Jean Green.

The Petitioners also claim that Respondents failed to prove an infringement of constitutionally protected rights. Jean Green's manipulation of the absent voter balloting, particularly in the senior citizens' residences, resulted in a debasement and dilution of the votes of Godfrey Franklin and Talib Karim. If a block of votes, sufficient in number to affect the outcome of the election, is subject to manipulation by an incumbent candidate who controls the election machinery, then the votes of opposing candidates and their supporters become worthless.

The advantage to those having such an opportunity is clear. The number of votes separating Franklin and Blackwell among the ballots cast in the precincts was small. The number of votes separating them among absent ballot voters was large, reflecting the advantage to those who were in a position to manipulate the absent voter balloting.

Although the facts of this case were not addressed in *Reynolds v. Sims,* 377 U.S. 533, 83 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), the Supreme Court clearly identified the right of suffrage as a protected right, and went on to state the following with respect to a diminution of that right:

> The right of suffrage can be denied by debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. 377 U.S. at p. 555.

The decision of the Michigan Court of Appeals, which is the decision clearly under attack by the Petitioners, is entirely in harmony with the decision of the Supreme Court of the United States in *Reynolds v. Sims.* Neither decision should be disturbed.

Respondents also asserted that other rights given constitutional protection were adversely affected: the right to freedom of association, to free political belief and expression, and to equal participation in the electoral process. *Shakman v. Democratic Organization of Cook County,* 481 F. Supp. 1315 (N.D. Ill. 1979), and the issue of the impairment of those rights was decided by the jury as well.

II. The Proofs Supported The Award Of Damages And The Award Of Injunctvie Relief

Petitioners object that because the claim for *quo warranto* was disposed of at trial on motion for directed verdict, that the election was validated; that Respondent Godfrey Franklin had no right to the office of Mayor; and he could therefore recover no damages.

This analysis by the Petitoners fails to recognize that two entirely different claims were presented by the Respondents at trial.

First, Respondents challenged Robert Blackwell's title to office as Mayor pursuant to a claim of *quo warranto.* There were two issues. First, were there irregularities in the election in the absent voter precinct. Second, were those irregularities sufficient to affect the outcome of the election. *Behrendt v. Wilcox,* 277 Mich. 232, 241, 269 N.W. 155 (1936). The trial court, using what Respondents claimed was an erroneous method, determined that there were insufficient invalid ballots to affect the outcome. All that the circuit court decided in granting the motion for directed verdict on the *quo warranto* claim was that the Respondents had failed to identify a suffi-

cient number of invalid ballots to affect the outcome of the election.

The second claim was for infringement of rights guaranteed by the First and Fourteenth Amendments to the United States Construction, which rights are protected by Title 42, Sec. 1983, of the United States Code. There were two issues to be decided by the jury; first, did the Defendants act under color of law, and second, did the actions of the Defendants infringe rights guaranteed by the United States Constitution. *Wirth v. Surles,* 562 F.2d 319, 321 (4th Cir. 1977).

The jury decided that the Respondents' constitutionally protected rights had been infringed, and had their rights of suffrage, of access, and of association and exchange of views not been impaired, the outcome of the election would have been different. There was no challenge to individual ballots in the 1983 claim. The award of damages was less than Respondent Franklin sought, he having asked for the Mayor's yearly salary of $45,500.00 times the four years of office. The jury awarded only $45,500.00, clearly a compromise verdict.

Although Petitioners complain that the injunctive remedy is inappropriate, they did not set forth in their appendix the text of the injunctive order. The order is appended to this Brief as Appendix 2.

The injunctive order of January 22, 1985, required Petitioner Jean Green to review the procedures of her office and to report to the Court with respect to those steps taken to insure that elections would be conducted in accordance with the law.

Petitioner Eugene Ford was ordered not to sit as an election commissioner until such time as he held the office, as prescribed by the City of Highland Park Charter, which he was required to hold before he could act as an election commissioner.

The courts have broad authority in applying equitable remedies pursuant to Title 42, Section 1983. The objective of the statute is broadly stated as follows:

> Section 1983 authorizes federal courts in civil rights cases to grant broad relief in equity, or other proper proceedings and is designed to provide a comprehensive remedy for the deprivation of constitutional rights. See *McNeese v. Board of Education*, 373 U.S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963); *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961); *Smith v. Hampton Training School for Nurses*, 360 F.2d 577, 581 (1966).

This Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S. Ct. 1267; 28 L. Ed. 2d 554 (1971), discussed the equitable powers of the courts as follows:

> However, in seeking to define the scope of a remedial power or the limits on remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern, and we have sought to suggest the nature of limitations without frustrating the appropriate scope of equity . . . 91 S. Ct. at 1283.

The Court quoted from *Hecht Co. v. Bowles*, 321 U.S. 321, 64 S. Ct. 587, 88 L. Ed. 754 (1944), wherein the Court had earlier considered the nature of equity power:

> The essence of equity jurisdiction has been the power of the chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. 321 U.S. at 329-330.

Petitioners Jean Green and Eugene Ford were guilty of violating the state election law and the city charter. The Court ordered them to comply with the law, and Jean Green was ordered to report to the Court with respect to efforts made by her to correct past improprieties. That remedy was clearly within the scope of the equitable powers of the court.

———o———

CONCLUSION

The Petition for Writ of Certiorari, like the Petitioners' motion for rehearing in the Michigan Court of Appeals, and their Delayed Application for Leave to Appeal in the Michigan Supreme Court, and their Motion for Rehearing in the Michigan Supreme Court, is simply a continuation of the dilatory and vexatious proceedings that have been maintained by them since the decision by the Michigan Court of Appeals.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

SCHIER, DENEWETH & PARFIT, P.C.

By: CARL F. SCHIER (P 19976)
Attorney for Respondents

Dated: May 25, 1988

APPENDIX

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 28th day of September in the year of our Lord one thousand nine hundred and eighty-seven.

Present the Honorable

DOROTHY COMSTOCK RILEY,
Chief Justice

81107 & (68)

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DENNIS W. ARCHER,
ROBERT P. GRIFFIN,

Associate Justices

GODFREY FRANKLIN and
TALIB KARIM,

Plaintiffs-Appellees,

v

HIGHLAND PARK CITY CLERK,

Defendant-Appellant,

and

DIRECTOR OF THE HIGHLAND PARK DEPARTMENT OF PUBLIC WORKS AND MEMBER OF THE HIGHLAND PARK, ELECTION COMMISSION,

Defendant-Appellant,

and

SC: 81107
COA: 82887
LC: 83-337-651-AW

THE CITY OF HIGHLAND PARK, a municipal corporation; MAYOR AND MAYOR-ELECT OF THE CITY OF HIGHLAND PARK; ACTING CITY ATTORNEY FOR THE CITY OF HIGHLAND PARK ELECTION COMMISSION; CHIEF OF POLICE AND MEMBER OF THE HIGHLAND PARK ELECTION COMMISSION, jointly and severally,

Defendants.

On order of the Court, the motion for immediate consideration is considered, and it is GRANTED. The delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

0922

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 28th day of September in the year of our Lord one thousand nine hundred and eighty-seven.

(SEAL)

/s/ Corbin R. Davis, Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GODFREY FRANKLIN and TALIB KARIM,

Plaintiffs,

vs Case No: 83 337651 AW

THE CITY OF HIGHLAND PARK, a municipal corporation; ROBERT BLACKWELL, in his capacity as present Mayor and as Mayor-elect of the City of Highland Park; JEAN GREEN, in her capacity as present City Clerk, and as City Clerk-elect of the City of Highland Park; NORRIS GOUDY, in his capacity as Acting City Attorney of the City of Highland Park and Chairman of the Highland Park Election Commission; CARL KERTTU, in his capacity as Chief of Police and as a member of the Highland Park Election Commission; and EUGENE FORD, in his capacity as Director of the Highland Park Department of Public Works and as a member of the Highland Park Election Commission, Jointly and Severally,

Defendants.

_____/

ORDER GRANTING INJUNCTIVE RELIEF IN FAVOR OF THE PLAINTIFFS AND AGAINST DEFENDANTS JEAN GREEN AND EUGENE FORD

At a session of the court held in the City County Building, Detroit, Michigan, on January 22, 1985.
PRESENT: THE HONORABLE MICHAEL L. STACEY, CIRCUIT JUDGE.

Plaintiffs' claims for equitable relief as stated in Count II of their Third Amended Complaint, having been brought on for trial commencing the 10th day of September, 1984, and the trial having been concluded on Thursday, October 18, 1984, and it appearing to the court that there were irregularities in the conduct of the November, 1983, general election in the city of Highland Park, the court having delivered an opinion thereon from the bench, and the court being otherwise fully advised in the premises;

IT IS ORDERED that Defendant Jean Green shall review the procedures of the clerk's office, with respect to the conduct of all elections in the city of Highland Park, Michigan, and,

IT IS FURTHER ORDERED that the Defendant Jean Green shall report, in writing, to this court with respect to those steps taken to insure that elections will be conducted strictly in accord with the laws of the state of Michigan, the lawful rules, regulations and directions of the Secretary of State, and the ordinances and charter of the city of Highland Park.

IT IS FURTHER ORDERED that Defendant Eugene Ford is not properly a member of the City of Highland Park Election Commission, and he is ordered not to act as a member of the Election Commission until such time as he is appointed to that office, prescribed by the charter city of Highland Park, which he must hold in order to sit lawfully as an Election Commissioner of the city of Highland Park.

IT IS FURTHER ORDERED AND ADJUDGED that this court shall retain jurisdiction of this matter for

the supervision, enforcement and the oversight of this injunctive order.

/s/ Susan D. Borman
For The Honorable Michael L. Stacey,
Circuit Judge

A TRUE COPY
JAMES R. KILLEEN
CLERK

BY SN
DEPUTY CLERK

James W. McGinnis